TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935

No. 67

MORRIS MILLER, PETITIONER,

vs.

IRVING TRUST COMPANY, AS TRUSTEE IN BANKRUPTCY OF SARNOFF-IRVING HAT STORES, INC., BANKRUPT

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED MAY 23, 1935.

CERTIORARI GRANTED JUNE 3, 1935.

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

In Bankruptcy

In the Matter of SARNOFF-IRVING HAT STORES, INC., a Corporation, Bankrupt

PROOF OF PRIORITY AND GENERAL CLAIM AND PROXY

UNITED STATES OF AMERICA,
District of New Jersey,
State of New Jersey,
County of Essex, ss:

At the above District, in the County of Essex and State of New Jersey, on the date hereinafter set forth, came Morris Miller, who makes oath and says:

1. I am the claimant. My address is No. 211 Springfield Avenue, Newark, New Jersey.

2. The above bankrupt was, at and before the time of the filing of its petition of bankruptcy herein, and still is justly and duly indebted to me in the aggregate sum of Sixteen thousand six hundred twenty-five Dollars ($16,625.00), and the consideration for this debt is as follows:

3. On January 17th, 1928, I entered into an agreement of lease bearing the aforesaid date, with the above bankrupt, a true copy of which is annexed hereto and made a part hereof, and is marked Schedule "A."

[fol. 2] 4. Thereafter, on December 29th, 1931, the above named bankrupt and I entered into an agreement modifying the consideration called for under the terms of the aforesaid lease for a period beginning with November 1st, 1931, and ending July 31st, 1933, at a stated consideration of Three hundred Dollars ($300.00) per month, payable in advance on the first day of each and every month, which agreement, by its terms ratified, approved, confirmed and continued the aforesaid lease in all other respects in full force and effect, a copy of which agreement is attached hereto and made part hereof, and is marked Schedule "B."

5. On April 27th, 1932, the aforesaid bankrupt corporation was adjudged insolvent by the United States District Court for the Southern District of New York (H. McLachlan & Co., Inc., a corporation, Complainant, v. Sarnoff-Irving Hat Stores, Inc., Defendant, In Equity E-67-96), at which time the above named bankrupt was in possession of the premises mentioned and described in the aforesaid lease.

6. Thereafter, by further order of the United States District Court for the Southern District of New York, the Irving Trust Company and Max Sarnoff were appointed receivers in equity for the creditors and stockholders of the aforesaid bankrupt corporation, and as receivers entered into possession of the said premises, and remained there until June 1st, 1932, at which time they notified this claimant that they repudiated and disaffirmed all leases made by the above named bankrupt corporation, and affecting No. 203 Springfield Avenue, Newark, New Jersey, as of the date of their appointment, to wit, April 28th, 1932, with [fol. 3] the express provision that the said disaffirmance was in no wise to alter any arrangements that they as receivers might have entered into with this claimant, for the occupation by them of the said premises for the period of time that they continued the business of the above named bankrupt. As a result of the notice given, the receivers on behalf of the bankrupt corporation, breached the aforesaid lease before the within proceedings in bankruptcy were filed, to the damage of this claimant.

7. By reason of the foregoing, there was due and owing to this claimant as of June 1st, 1932, and there is due presently to this claimant, the following:

(a) Rent for the months of March and April, 1932, at the rate of $300.00 per month, in all amounting to the sum of $600.00

(b) The sum of $16,025.00, representing the difference between the rent reserved in said lease for a period beginning with May 1st, 1932, and ending July 31st, 1938, amounting to the sum of $32,000.00, and the fair annual rental of the said premises, to wit, the sum of $2,400.00 per year for a period of three years, and

the further sum of $2,700.00 per year for a period of three years, three months, being the balance of said terms as called for in said lease	16,025.00
Total	$16,625.00

8. Claim for priority of payment is made for Six hun-
[fol. 4] dred Dollars ($600.00), as aforesaid, for all rental and other charges due under the said lease at the time of the appointment of the receivers in equity, for the reason that at the time of their appointmnt as such receivers, there were at the premises sufficient goods and chattels to satisfy a distress for the said moneys due and owing to this claimant at that time.

9. In pursuance of an order of the United States District Court, for the Southern District of New York, bearing date May 25th, 1932, and on or about June 24th, 1932, this claimant filed with the Irving Trust Company, receiver in equity of the above named bankrupt corporation, a proof of claim for Six hundred Dollars ($600.00), representing a priority claim for rent, as aforesaid, and for Sixteen thousand twenty-five Dollars ($16,025.00), representing damages sustained by reason of the disaffirmance and repudiation by the receivers of the said bankrupt corporation, of the lease made between this claimant and the said bankrupt corporation, which claim was accepted and filed, and no proceedings have heretofore been taken rejecting said claim.

10. No part of the aforesaid debt has been paid, and there are no set-offs or counterclaims against the sums claimed herein, no judgment has been rendered therefor or for any part thereof, nor has this claimant, nor any person for or on behalf of him, or to his knowledge and belief, had or received for his use any security for the said debt whatsoever, nor has any note or evidence of said debt been received.

Name: Morris Miller; Address: 211 Springfield Ave., Newark, N. J.

[fol. 5] Subscribed, sworn to and acknowledged before me this 21st day of September, 1932, said subscriber being known to me to be the person described in and who signed, swore to and acknowledged the above instrument.

Stern, a Master in Chancery of N. J.

Proxy

To S. Arthur Stern and Sidney Stein, Esquires, or their representatives:

The undersigned, of the City of Newark, County of Essex and State of New Jersey, a creditor of the above named bankrupt, does hereby authorize you and each of you to attend the meeting or meetings of creditors of the bankrupt, advertised or directed to be held at a Court of Bankruptcy, or at such other place and time as may be appointed by the Court for holding such meeting or meetings, or any adjournment or adjournments thereof that may be held, and then and there from time to time and as often as there may be occasion, for said creditor and in said creditor's name, to vote for or against any proposal or resolution that may be then submitted under the acts of Congress relating to bankruptcy, and in the choice of trustee or trustees of the estate of said bankrupt, and to accept such appointment of trustees except that permission is hereby given to delegate the power of the selection of [fol. 6] a trustee or trustees to such person as you in your discretion may deem best, and with like powers to attend and vote at any meeting or meetings of creditors, or sitting or sittings of the Court which may be held therein, for any of the purposes aforesaid, also to accept any composition proposed by said bankrupt in satisfaction of said debt, and receive payment of dividends and money due said creditor under any composition or for the declaration of dividend, or for any other purpose in said creditor's interest whatsoever.

In witness whereof I have hereunto set my hand and seal this 21st day of September, 1932.

Morris Miller (L. S.)

Signed, sealed and delivered in the presence of Stern.

State of New Jersey,
County of Essex, ss:

Be it remembered, that on this 21st day of September, 1932, before me, a Master in Chancery of New Jersey, personally appeared Morris Miller, who I am satisfied is the person who executed the foregoing power of attorney, and I having made known to him the contents thereof, he did thereupon acknowledge that he signed, sealed and delivered

the same as his voluntary act and deed for the uses and purposes therein expressed.

Stern, Master in Chancery of N. J.

[fol. 7] SCHEDULE A

Lease Annexed to Proof of Claim

This Indenture of Lease made this 17th day of January, 1928, between Morris Miller, of the City of Newark, County of Essex, and State of New Jersey, hereinafter referred to as the "landlord", and Sarnoff-Irving Hat Stores, Inc., hereinafter referred to as the "tenant,"

Witnesseth: In consideration of the promises, covenants and agreements herein entered into between the parties, the parties do agree to and with each other, for themselves, and their respective heirs, executors, administrators, successors and assigns, as follows:

1. The landlord does hereby demise and lease unto the tenant the store premises commonly known as 203 Springfield Avenue, Newark, New Jersey, together with a portion of the cellar underneath the same, which store is now in the course of construction, hereinafter referred to as the "premises," for the term beginning August 1, 1928 and ending July 31, 1938, at the annual rental of Forty-five Hundred ($4500) Dollars for the first two years of said term, at the annual rental of Five Thousand ($5,000) Dollars for the next three years of said term, and at the annual rental of Fifty-five Hundred ($5500) Dollars for the balance of said term. All of said rentals shall be payable in equal monthly installments in advance, on the first day of each and every month during said term.

2. In addition to the foregoing rental, and as part of the total rent to be paid by the tenant to the landlord, the tenant agrees:

[fol. 8] (b) To procure, maintain and pay the premiums on plate glass insurance covering said premises;

(c) To procure, maintain and pay the premiums for public liability insurance, insuring and indemnifying the landlord and tenant, as their respective interests may appear,

against any loss or damage that may be incurred by any person, or the property of any person, by reason of any use of said premises, which insurance shall be in such amount that the company shall be required to pay not in excess of $5,000.00 to any one person, and not in excess of $10,000.00 by reason of any one accident;

(d) The aforesaid items of additional rent shall be payable on the first of the month next succeeding the incurring of the indebtedness therefor.

3. This lease is made upon the following covenants and conditions, each of which the respective parties hereto agree to observe and perform:

(a) The tenant shall pay said several rentals punctually.

(b) Unless the landlord consents thereto in writing, the tenant will not, under penalty of forfeiture and damages:

1. Use or permit said premises to be used for any other purpose than for the purpose outlined in the rider attached hereto and made part hereof.

2. Assign this lease, nor re-let or underlet said premises or any part thereof.

3. Make any alterations to said premises.

[fol. 9] (c) The tenant will, at its own cost, promptly comply with and perform all statutes, ordinances, orders, requirements and regulations, present and future, of any Federal, State, county and/or municipal authority, or agency or sub-division thereof having jurisdiction over or affecting said premises, with the exception of structural changes.

(d) The tenant, at its own cost, will keep the premises in good, safe and proper repair, and tenantable condition during the term, (wear and tear arising from a reasonable use of the same, and damages by the elements excepted); and will not suffer any act of commission or omission which will increase the rate of insurance, in existence at the execution hereof, and will not call upon the landlord, during the term of this lease, for the making of any repairs whatsoever. At the expiration of said term, the tenant shall yield up possession thereof to the landlord.

(e) The landlord may enter upon said premises at reasonable hours on week days to examine the same, and may during the last six months of said term, exhibit the same to any person or persons, and during said time may also maintain "To Let" and "For Sale" notices on the outside walls thereof.

(f) The tenant shall indemnify and save the landlord harmless from all fires, suits, proceedings, claims or actions of any kind arising out of, or in any wise connected with the use or occupation of said premises, and its appurtenants, or arising by reason of any breach or nonperformance of any covenant or condition hereof.

(g) Upon any breach or violation by the tenant of any of the terms, covenants or conditions of this lease, other than [fol. 10] those providing for the payment of rent, for a period of ten days after written notice, the landlord may, at its election, terminate this lease, and upon such election, this lease, and all the estate of the tenant in said premises, shall come to an end, and the landlord may thereupon reenter the said premises as of its former estate. Any waiver by the landlord of any breach shall not be deemed or construed to be a waiver of any future breach.

(h) If the premises shall become vacant or abandoned during said term, or if tenant shall be dispossessed or removed from said premises, or if the term hereof shall end prior to the expiration date fixed herein because of any act of the tenant, or because of the happening of any contingency or event herein provided for, the tenant does hereby authorize the landlord, at its option, to reenter the same as agent of the tenant, or otherwise, to re-let the same, and to repair or remodel the same, if necessary or desirable for re-letting purposes, and receive and apply the rents so received to the payment of rents due hereunder, together with the costs of such repairing and remodeling. The tenant shall not be entitled to any sruplus accruing as a result of any re-letting, and shall remain liable for any deficiency, which deficiency shall, at the option of the landlord, become payable on demand, or become payable as it accrues from month to month. The tenant further agrees, that notwithstanding any entry or re-entry by the landlord, whether by summary proceedings, termination or otherwise, it will pay and be liable for, on the days originally fixed herein for

the payment thereof, amounts equal to the several installments of rent and other charges reserved herein, in the [fol. 11] same manner as if this lease had not been terminated, and/or in the same manner, as if the landlord had not entered or re-entered as aforesaid. No entry or reentry by the landlord, whether had or taken under what are known generally as summary proceedings, or otherwise, shall be deemed to absolve or discharge the tenant from liability hereunder.

(i) If at any time, during the term hereof, proceedings in bankruptcy shall be instituted by or against the tenant, resulting in its adjudication as a bankrupt, or if the tenant shall compound its debts, or assign its estate, or effects for payment thereof, or if any execution shall issue against the tenant, or its property on the premises, and a sale be had thereunder, or if a receiver or trustee shall be appointed of the tenant, or of its property, or if this lease shall by operation of law devolve upon or pass to any person or persons other than the tenant personally, then and in any of said cases, this lease shall, at the option of the landlord, cease and come to an end, ten days after written notice shall be served by the landlord upon the tenant, or upon its assignee, receiver, and/or trustee, personally, or by registered mail addressed to the tenant, and/or assignee, receiver or trustee, at the demised premises. Thereupon, at the end of said ten day period, the landlord shall immediately become entitled to repossess said premises, and re-enter the same as of its former estate, and all sums due hereunder, shall immediately become due and payable upon demand. This covenant and condition shall extend to and be binding upon any assignee or sub-lessee of the tenant, whose assignment [fol. 12] or sub-lease has been consented to by the landlord.

(j) In the event that the demised premises, or any part thereof, shall be taken for public or quasi-public use, by any power or authority, having the right to take the same by condemnation eminent domain, or otherwise, the amount awarded for compensation for the whole or part of the demised premises so taken, shall be paid to the landlord, and the tenant hereby expressly grants unto the landlord the entire amount of said award or compensation hereby expressly disclaiming all right, title and interest therein, and

agrees that it shall have no claim for any damage or loss against the landlord by reason of such condemnation or taking. This lease shall come to an end as of the date title shall vest in the taking body, and the landlord and tenant shall thereupon be released of and from all obligations and liability to each other accruing hereunder thereafter. The tenant shall pay all rent accrued up to the time of the condemnation, and if any rent has been paid in advance, or any security been furnished, the landlord shall return any balance not owing to him.

(k) Until otherwise agreed, any notice provided for by this lease may be served either personally or by mailing the same by registered mail addressed to the landlord at No. 79 Baldwin Avenue, Newark, New Jersey, and to the tenant at Paramount Theatre Building, Times Square, New York City.

(l) The landlord shall not be liable to the tenant for any damages sustained by it due to defects or change in condition in the premises, or in any part of the premises of which [fol. 13] the demised premises are a part, nor to any person, nor to any goods or things of any person, by reason of any cause whatsoever, relating or occurring in the demised premises, or in any other portion of the building of which the demised premises are a part.

(m) This lease shall be subject and subordinate at all times to the lien of any mortgages now encumbering, or which may hereafter be placed upon the lands and premises, of which the demised premises are a part, provided the total amount of mortgage encumbrances shall not exceed Three Hundred Thousand ($300,000) Dollars. The tenant covenants and agrees to duly execute, acknowledge and deliver upon demand, such further instrument or instruments as shall be required by the landlord and/or any mortgagee for the purpose of carrying this clause into effect, and the tenant hereby appoints the landlord its attorney-in-fact irrevocably, to execute and deliver any such instruments, in the event of its refusal so to do.

(n) The landlord covenants that upon the tenant paying the rentals and performing the covenants aforesaid, the tenant shall and may peaceably and quietly have, hold and enjoy the said premises for the term aforesaid.

(o) Nothing herein contained shall be construed as a consent on the part of the landlord to subject the estate of the landlord to liability under the Mechanic's Lien Law of the State of New Jersey, it being expressly understood that the landlords' estate shall not be subject to such lability.

[fol. 14] (p) In case the demised premises, or any part thereof, shall be damaged by fire, without any fault on the part of the tenant, then in case

1. Such damage should be so slight as not to interfere substantially with the use by the tenant of the demised premises, the landlord shall repair the damage as speedily as possible, and there shall be no abatement of rent;

2. Such damage should render untenantable the demised premises, in whole or in part, the landlord shall repair the same as speedily as possible, and there shall be an abatement from the date of the fire of so much of the rent as the rental value of the untenantable portion of the premises shall fairly bear to the rent of the entire demised premises.

3. Of a total destruction of the premises, or of the building, of which the premises are a part, or if in case of fire, the landlord elects to rebuild irrespective of the extent of the damage, then this lease shall terminate ten days after the landlord shall serve written notice to that effect upon the tenant. The tenant shall pay all rent to the time of the fire, and if any rent has been paid in advance, or any security furnished, the landlord shall return any balance not owing to him.

(q) If the tenant should omit to make any payment, other than rent, which the tenant is obliged to make hereunder, the landlord may make or pay the same, and the amount or cost thereof, shall be added to, and be deemed part of the next installment of rent following due thereafter.

5. The terms, covenants and conditions of the within lease shall be binding upon, and enure to the benefit of the parties [fol. 15] hereto, their respective heirs, executors, administrators, successors and assigns, as the case may be.

6. That the neuter gender when used herein and in the acknowledgment hereinafter set forth shall include all persons and corporations and words used in the singular shall

include words in the plural where the text of the instrument so requires.

Rider attached to and made part of lease entered into between Morris Miller and Sarnoff-Irving Hat Stores, Inc., affecting premises 203 Springfield Avenue, Newark, N. J., dated January 17th, 1928.

7. Unless the landlord consents thereto in writing, the tenant will not, under penalty of forfeiture and damages, use or permit said premises to be used for any other purpose than for the sale of hats and caps and men's and boys' furnishings. The tenant shall not, however, be permitted to sell in said premises men's or boys' clothing, including overcoats, suits, vests, trousers and other similar men's and boys' wearing apparel.

8. As long as this lease is in effect, the landlord agrees not to rent any other store in said building commonly known as Nos. 203-213 Springfield Avenue, Newark, N. J., for use as a men's and boys' hat and cap shop. Nothing herein contained, however, shall be so construed as to prohibit the landlord from renting any store in said building for the sale of men's furnishings, provided that men's and boys' hats and caps are not sold as part of such men's furnishings.

9. The landlord agrees to install a new store front in said demised premises at his own expense substantially in ac-
[fol. 16] cordance with the sketch attached hereto and made part hereof.

10. The tenant agrees that it will not erect or maintain on said demised premises any sign or other advertising matter, unless it first obtains the landlord's consent and approval thereof.

11. The tenant represents to the landlord that the execution of the within lease was not effected through the medium of any broker knowing that the landlord relied upon the truth of the within representation in executing the within instrument.

13. The landlord agrees to furnish the tenant without any additional rent, reasonable heat for said demised premises from the first day of October to the first day of April in each year. It is understood, however, that the landlord is

not to be responsible in damages to the tenant for failure to furnish such heat, provided his failure so to do is caused by matters not reasonably within his control.

In witness whereof the parties have hereunto set their hands and seals, and the corporate parties hereto have caused these presents to be executed by their duly authorized officers.

Morris Miller. (L. S.) Sarnoff-Irving Hat Stores, Inc., by Simon Sarnoff, President.

Signed, sealed and delivered in the presence of—
Attested: S. L. Ruzon, Secretary. (Seal.)

[fol. 17] Acknowledgments

STATE OF NEW YORK,
County of New York, ss:

Be it remembered that on this 17th day of January, one thousand nine hundred and twenty-eight, before me, the subscriber, a notary public of New York, personally appeared S. L. Ruzon, known to me to be the Secretary of the Sarnoff-Irving Hat Stores, Inc., the Corporation within named, who, being by me duly sworn on his oath, said and made proof to my satisfaction that he is such Secretary, and that he well knows the Common Seal of said Corporation, and that the Seal affixed to the within lease is such Common Seal and was thereto affixed by the President of said Corporation, and that the said lease was by the Simon Sarnoff, President, also signed and delivered as and for the voluntary act and deed of said Corporation in the presence of said deponent, who thereupon subscribed his name thereto as attesting witness.

Sworn and subscribed before me, this 17th day of January, 1928.

Mildred Gold, Notary Public of New York. County Clerk's Certificate attached.

[fol. 18] STATE OF NEW JERSEY,
County of Essex, ss:

Be it remembered that on this 24th day of January, one thousand nine hundred and twenty-eight, before me, the subscriber, a notary of New Jersey, personally appeared Morris Miller who, I am satisfied, is one of the parties men-

tioned in the within lease, and to whom I first made known the contents thereof, and thereupon I acknowledged that Morris Miller signed, sealed and delivered the same as his voluntary act and deed for the uses and purposes therein expressed: And the said Morris Miller being by me privately examined, separate and apart from husband, acknowledged that he signed, sealed and delivered the same as his voluntary act and deed, freely without any fear, threats or compulsion of wife's said husband.

Henry Siegel, Notary Public of New Jersey.

[fol. 19] SCHEDULE "B"

Agreement Annexed to Proof of Claim

Memorandum of Agreement made this 29th day of December, 1931, between Morris Miller, of the City of Newark, Essex County, New Jersey, hereafter referred to as the party of the first part; and Sarnoff-Irving Hat Stores, Inc., a corporation, hereafter referred to as the party of the second part, witnesseth:

Whereas, the parties hereto did enter into a certain agreement of lease covering store premises commonly known as #203 Springfield Avenue, Newark, N. J., together with a portion of the cellar underneath the same, for the term beginning August 1st, 1928, and ending July 31st, 1938; and

Whereas, the rental under the terms of the aforesaid lease as incorporated therein, is to the following effect:

$4,500.00 for the first two years of the said term (August 1st, 1928, to July 31st, 1930);

$5,000.00 for the next three years of said term (August 1st, 1930, to July 31st, 1933);

$5,500.00 for the balance of said term (August 1st, 1933, to July 31st, 1938); and

Whereas, the parties hereto are desirous of modifying such portions of paragraph one of the said lease, hereinabove more particularly recited, without modifying any [fol. 20] other terms, covenants and conditions thereof, for a period beginning November 1st, 1931, and ending July 31st, 1933;

Now, therefore, this indenture witnesseth:

In consideration of the sum of One Dollar, each to the other in hand paid and of the mutual covenants and conditions hereto contained, the parties do agree as follows:

1. That the rental called for under the terms of the aforesaid lease for the period beginning November 1st, 1931, and ending July 1st, 1933, shall be Three Hundred ($300.00) per month, payable in advance on the first day of each and every month.

2. That except as herein modified, the aforesaid lease is ratified, approved, confirmed and continued in full force and effect.

In witness whereof the party of the first part has hereunto set his hand and seal and the party of the second part has caused these presents to be signed by its president and attested by its secretary and its corporate seal to be hereto affixed the day and year first above written.

Signed, sealed and delivered in the presence of—
(Signed) Morris Miller, L. S. Sarnoff-Irving Hat Stores, Inc., by (Signed) Simon Sarnoff, President.
Attest: (Signed) S. L. Ruzon, Secretary.

[fol. 21] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

In Equity

H. McLACHLAN & Co., INC., Complainant,
and
SARNOFF-IRVING HAT STORES, INC., Defendant

AMENDED PROOF OF CLAIM OF MORRIS MILLER

Priority and General Claim

STATE OF NEW JERSEY,
County of Essex, ss:

Morris Miller, being duly sworn on his oath according to law, deposes and says:

1. This deponent is the landlord mentioned in a certain indenture of lease dated January 17th, 1928, made between him and Sarnoff-Irving Hat Stores, Inc., a corporation, a

true copy of which is annexed hereto and marked Schedule "A."

2. Thereafter, and on December 29th, 1931, Morris Miller and Sarnoff-Irving Hat Stores, Inc., a corporation, entered into an agreement modifying the consideration called for under the terms of the aforesaid lease, for a period beginning November 1st, 1931, and ending July 31st, 1933, at a stated consideration of $300 per month, payable in advance on the first day of each and every month, and did by [fol. 22] the aforesaid memorandum ratify, approve, confirm and continue the aforesaid lease in all other respects in full force and effect, copy of which agreement is attached hereto and made part hereof and marked Schedule "B."

3. Deponent is advised that the defendant was adjudicated insolvent by the United States District Court, Southern District of New York, by order of that Court bearing date April 27th, 1932, and that at the time of the appointment of the receivers by said Court, Sarnoff-Irving Hat Stores, Inc., was in possession of the premises mentioned and described in the aforesaid lease.

4. Thereafter, Max Sarnoff and Irving Trust Company, a corporation, receivers appointed for the Sarnoff-Irving Hat Stores, Inc., entered into possession of the premises, and remained there until June 1st, 1932, at which time it notified this deponent that they had disaffirmed all leases and agreements made between the Sarnoff-Irving Hat Stores, Inc., and affecting premises 211 Springfield Avenue, Newark, New Jersey, as of the date of their appointment April 28th, 1932, with the provision, however, that the said disaffirmance in nowise was to alter any arrangement that they, as receivers, might have entered into with this deponent for the period of time during which they were to continue with the business of Sarnoff-Irving Hat Stores, Inc.

5. That by reason of the foregoing, there is due and owing to this deponent, under his said lease the following:

[fol. 23] (a) Rent for the month of March and April, 1932, at the rate of $300 per month, amounting in all to $600.00 ... $ 600.00

(b) The sum of $16,025.00 representing the difference between the rent reserved in the said lease for a period beginning May 1st, 1932 and ending July 31st, 1938, amounting to the sum of $32,000.00 and the fair annual rental of said premises to-wit, the sum of $2,400.00 per year for a period of 3 years, and the further sum of $2,700.00 per year for a period of 3 years and 3 months, being the balance of said term as called for under said lease 16,025.00

6. Deponent is advised and verily believes that the assets of the defendant corporation are more than sufficient to pay its liabilities.

7. Claim for priority of payment is made for all rental and other charges due under said lease at the time of the appointment of the receivers, amounting to $600.00 as aforesaid, for the reason that at the time of the appointment of the receivers sufficient goods and chattels of the said defendant corporation were located on the said premises to satisfy a distress for the said moneys due and owing at that time.

[fol. 24] 8. No part of the aforesaid debt has been paid, and there are no setoffs or counterclaims against the sums claimed herein, and no note has been received, and no judgment has been rendered; and this deponent has not, nor has any person by his knowledge or order or for his use, have or receive any manner or security for said debt whatsoever.

Morris Miller.

Sworn to and subscribed before me this 24th day of June, A. D. 1932.

Stern, Master in Chancery of New Jersey.

Annexed to this Amended Proof of Claim are Schedules "A" and "B", being the Lease dated January 17, 1928 and the Agreement dated December 29, 1931, appearing hereinabove as Schedules "A" and "B" annexed to the original Proof of Claim.

[fol. 25] In United States District Court, Southern District of New York

[Title omitted]

Objections of Trustee

To Hon. Oscar W. Ehrhorn, Referee in Bankruptcy:

Irving Trust Company, Trustee in Bankruptcy herein, does hereby object to the duplicate claims filed herein by Morris Miller, each in the sum of $16,625.00, upon the ground that the indebtedness of the bankrupt to the said claimant is but the sum of $1,000.00.

The Trustee in Bankruptcy therefore prays that an order be entered consolidating said claims, and reducing the same to the sum of $1,000.00.

Dated, New York, April 27th, 1933.

McManus, Ernst & Ernst, Attorneys for Trustee, Office and P. O. Address, 170 Broadway, Borough of Manhattan, New York City.

[fol. 26] In United States District Court, Southern District of New York

[Title omitted]

Notice of Hearing—September 27, 1933

To Stein & Stern, Esqs., Attorneys for Morris Miller, 17 Academy Street, Newark, New Jersey:

Please take notice that Irving Trust Company, trustee in Bankruptcy herein, has duly objected to the duplicate

claims filed herein by Morris Miller, each in the sum of $16,025.00, upon the ground that the indebtedness of the bankrupt to the said claimant is but the sum of $1,000.00.

Please take further notice that a hearing will be had on the 17th day of October, 1933, at 10:30 A. M, or as soon thereafter as counsel can be heard, before Oscar W. Ehrhorn, Esq., Referee in Bankruptcy, at his office, No. 280 Broadway, Borough of Manhattan, City, County and State of New York, upon the said objections to the claim of Morris Miller, and that at that time the undersigned will move for an order consolidating said claims and reducing and al-
[fol. 27] lowing the same as a general claim herein in the sum of $1,000.00.

Dated, New York, September 27th, 1933.

Yours, etc., McManus, Ernst & Ernst, Attorneys for Irving Trust Company, Trustee in Bankruptcy of Sarnoff-Irving Hat Stores, Inc., Office & P. O. Address, 170 Broadway, Borough of Manhattan, New York City.

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

NOTICE OF HEARING—March 16, 1934

To Stroock & Stroock, Esqs., Attorneys for Morris Miller, 141 Broadway, New York City:

Please take notice that a hearing will be had before Hon.
[fol. 28] Oscar W. Ehrhorn, Referee in Bankruptcy, at his office, 280 Broadway, Borough of Manhattan, City, County and State of New York, in the Southern District of New York, on the 27th day of March, 1934, at 12:00 o'clock noon of said day, on the objections filed by Irving Trust Company, as Trustee in Bankruptcy herein, to the duplicate claims filed herein by Morris Miller, each in the sum of $16,625.00.

Please take further notice that the undersigned will move the Court at that time for an order consolidating the said

claims of Morris Miller, and reducing the same to the sum of $600.00 as a general claim herein.

Dated, New York, March 16th, 1934.

Yours, etc., McManus, Ernst & Ernst, Attorneys for Irving Trust Company, as Trustee in Bankruptcy of Sarnoff-Irving Hat Stores, Inc., Office & P. O. Address, 170 Broadway, Borough of Manhattan, New York City.

IN UNITED STATES DISTRICT COURT

MINUTES OF HEARING BEFORE THE REFEREE

Mr. Melzer: Next is the claim of Morris Miller. This claim was filed in the sum of $16,025. There are two objections to this claim. I assert that the only amount due the claimant at the time of the filing of the petition is the sum of $600.00, and I ask that the claim be reduced to that amount.

[fol. 29] The balance would accrue subsequent to the filing of the petition.

The Referee: Was there any breach before?

Mr. Melzer: There was a breach before the filing of the petition. There was a breach of the lease upon the filing of the Equity Petition and a reentry by the landlord prior to the filing of the petition, and in that regard it does come within the Circuit Court of Appeals case, but the opinion in that Circuit Court of Appeals case specifically says that besides the breach, besides the right of action, the lease must provide that they can sue at that time for the difference between the reasonable re-rental value and the rental reserved in the lease, and Judge Hand says that if it does not contain such a provision then it would not be provable. This lease does not contain that clause, and therefore it is not provable.

The Referee: Do you want to submit a memorandum?

Mr. Steefel: Yes. We have agreed on a stipulated set of facts which I should like to have marked as an exhibit.

Mr. Melzer: I submit a stipulation of the facts, to be marked as an exhibit, and, for the purpose of determining the questions of law, I will concede that those facts are true. In the event of your holding that the claim is provable, we will then come back and liquidate the claim.

Mr. Steefel: For the purpose of the record I move that our claim be liquidated and that testimony be taken to liquidate our claim.

(Stipulation received and marked Claimant's Exhibit A, April 5, 1934.)

The Referee: All papers in in one week. I will reserve decision.

[fol. 30] In United States District Court, Southern District of New York

[Title omitted]

Stipulation of Facts

It is hereby stipulated and agreed by and between the attorneys for Irving Trust Company, as Trustee in Bankruptcy of the above named bankrupt, and the attorneys for Morris Miller, claimant herein, that for and only for the purposes of the within action, the following facts are stipulated and agreed:

1. On January 17th, 1928, the claimant, Morris Miller, and the bankrupt entered into an agreement of lease, a true copy of which is annexed to the claimant's proof of claim herein.

2. Thereafter, and on December 29th, 1931, the bankrupt and the claimant entered into an agreement modifying said lease. A true copy of said modification agreement is annexed to the claimant's proof of claim.

3. On or about the 27th day of April, 1932, action was instituted in the United States District Court for the South-
[fol. 31] ern District of New York, entitled "H. McLachlan & Co., Complainant, against Sarnoff-Irving Hat Stores, Inc., Defendant," in which action and at which time, by order of said United States District Court, Irving Trust Company and Max Sarnoff were appointed Receivers in Equity for the creditors and stockholders of said company. Max Sarnoff subsequently resigned as co-receiver in Equity, and Irving Trust Company continued to act as sole Receiver in Equity, and as such Receiver remained in possession of the said premises until July 18th, 1932.

4. Irving Trust Company, as Receiver in Equity of Sarnoff-Irving Hat Stores, Inc., duly notified the claimant of its disaffirmance of the said lease on June 1st, 1932.

5. Irving Trust Company, as Receiver, vacated possession of the said premises on July 18th, 1932, and notified the claimant thereof.

6. The claimant reentered the said premises and took possession thereof on or about the 25th day of July, 1932, pursuant to the terms of the said lease.

7. Sarnoff-Irving Hat Stores, Inc., the bankrupt herein, filed a voluntary petition in bankruptcy on the 27th day of August, 1932.

Dated, New York, April 3rd, 1934.

McManus, Ernst & Ernst, Attorneys for Irving Trust Company, Trustee in Bankruptcy. Stroock & Stroock, Attorneys for Claimant.

[fol. 32] The following affidavit was not before the Referee in Bankruptcy, and the Trustee in Bankruptcy consented to the submission of this affidavit to the District Court upon the hearing on the petition to review upon the understanding that it would be considered only in connection with the question as to whether the facts gave rise to a provable claim in bankruptcy and not for the purpose of determining the amount of the claim.

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT SUBMITTED IN SUPPORT OF CLAIM

STATE OF NEW JERSEY,
County of Essex, ss:

Morris Miller, being duly sworn on his oath according to law, deposes and says:

1. Deponent is the owner of premises 203 Sprin-field Avenue, Newark, New Jersey, which premises were formerly leased to the above named bankrupt.

[fol. 33] 2. On August 29, 1932, deponent entered into an agreement of lease with Israel Wachsman, a copy of which lease is appended hereto and made part hereof. Rents in accordance with the terms of the lease were paid by Mr. Wachsman to July 1, 1933, at which time said lease by agreement was abandoned.

3. On July 1, 1933, this deponent entered into a lease with Moris Miller & Sons, a corporation, a copy of which lease is appended hereto and made part hereof. Rent in accordance with the terms of said lease has been paid, and said lease is now in full force and effect.

4. Deponent states that the lease made with Moris Miller & Sons, a corporation, is in truth a verity and a genuine lease, said Moris Miller & Sons, a corporation, being a tenant of another store in the premises of this deponent at an annual rental of Seventy-five hundred Dollars ($7500.00), and latter lease is also in full force and effect.

5. The capital stock issued and outstanding of Moris Miller & Sons, a corporation, is 420 shares, and the same is divided between this deponent, who holds 220 shares, Harry Miller, who holds 100 shares, and Martin Miller who holds ~~100~~ shares. The net worth of Moris Miller & Sons is approximately Seventy thousand Dollars ($70,000.00).

Moris Miller.

Sworn and subscribed to before me this 18th day of December, 1934.

Louis Stein, a Notary Public of N. J.

[fol. 34] EXHIBIT TO AFFIDAVIT

Lease

This indenture of lease made this 29th day of August, 1932, between Morris Miller, hereinafter referred to as the "landlord", and Israel Wachsman, hereinafter referred to as the "tenant."

Witnesseth: In consideration of the promises, covenants and agreements herein entered into between the parties, the parties do agree to and with each other, for themselves,

and their respective executors, administrators, successors and assigns, as follows:

1. The landlord does hereby demise and lease unto the tenant premises No. 203 Springfield Avenue, Newark, New Jersey, together with storage space in the cellar directly under the aforesaid premises, together with the use, during the term hereof and any renewal hereof, of the chattels and fixtures now contained in the said store, hereinafter referred to as the "premises", for the term beginning September 1, 1932, and ending August 31, 1933, at the annual rental of Eighteen Hundred Dollars ($1800.00), with an option to renew, subject to the conditions hereinafter set forth, for a term beginning September 1, 1933, and ending August 31, 1934, at the annual rental of Twenty-four Hundred Dollars ($2400.00); together with a further option to renew for a third year, subject to the conditions hereinafter set forth, for a term beginning September 1, 1934, and ending August 31, 1935, at the annual rental of $3,000.00. All of said rentals shall be payable in equal monthly installments in advance, on the first day of each and every month during said term, excepting that rent [fol. 35] for the first month shall be paid upon the execution hereof.

2. In addition to the foregoing rental, and as part of the total rent to be paid by the tenant to the landlord, the tenant agrees:

(b) To procure, maintain and pay the premiums on plate glass insurance covering the plate glass in said premises;

(c) To procure, maintain and pay the premiums for public liability insurance, insuring and indemnifying the landlord and tenant, as their respective interests may appear, against any loss or damage that may be incurred by any person, or the property of any person, by reason of any use of said premises, which insurance shall be carried by companies of adequate financial responsibility and shall be in such form that the company shall be obligated to pay by reason of injury and/or damages to any one person, a sum not in excess of $10,000.00, and sums aggregating not more than $20,000.00 by reason of any one happening;

(d) The aforesaid items of additional rent shall be payable on the first of the month next succeeding the incurring of the indebtedness therefor.

3. This lease is made upon the following covenants and conditions, each of which the respective parties hereto agree to observe and perform:

(a) The tenant shall pay said several rentals punctually.

(b) Unless the landlord consents thereto in writing, the tenant, under penalty of forfeiture and damages:

[fol. 36] 1. Will not use or permit said premises to be used for any other purpose than for the repairing, remodelling and manufacturing and sale of men's hats and caps, the landlord agreeing not to engage in a similar business in that portion of the building of which these premises are a part and which he presently occupies.

2. Will not assign this lease, nor re-let or underlet said premises, or any part thereof, except that permission is hereby granted to the tenant to assign this lease to any one or more members of his family, or to any corporation in which he and/or the member of his family shall be the sole stockholders and parties interested; provided, that under no circumstances shall the permission to make the within assignment, as aforesaid, relieve the tenant of his obligation to conform strictly with all the terms, covenants and conditions referred to in said lease, and the tenant agrees that in the event an assignment of the within lease is made, as aforesaid, his obligation for the prompt payment and performance of all the rents, terms, covenants and conditions referred to herein and required to be paid and performed, shall be strictly complied with, waiving all notice of default, and consenting that any extensions of time and changes in the matter of payment or performance of any of the terms and conditions of the said lease may be given by the landlord to any person or persons, firm or firms, to whom this lease may be assigned in the manner aforesaid, without any notice to the tenant, [fol. 37] and without affecting his liability hereunder.

3. Will not make any alterations to said premises.

(c) The tenant will, at its own cost, promptly comply with and perform all statutes, ordinances, orders, require-

ments and regulations, present and future, of any Federal, State, county and/or municipal authority, or agency or subdivision thereof having jurisdiction over or affecting said premises, including the lands appurtenant thereto.

(d) The tenant, at its own cost, will keep the premises in good, safe and proper repair, and tenantable condition during the term (wear and tear arising from a reasonable use of the same, and damages by the elements excepted); and will not suffer any act of commission or omission which will increase the rate of insurance in existence at the execution hereof, and will not call upon the landlord, during the term of this lease, for the making of any repairs whatsoever. At the expiration of said term, the tenant shall yield up possession thereof to the landlord, in as good condition as said premises were at the commencement of said term, reasonable wear and tear and damages by the elements excepted.

(e) The landlord may enter upon said premises at reasonable business hours on week days to examine the same, and may during the last six months of said term, exhibit the same to any person or persons, and during said time may also maintain "To Let" and "For Sale" notices on the outside walls thereof.

[fol. 38] (f) The tenant shall indemnify and save the landlord harmless from all fines, suits, proceedings, claims and/or actions of any kind arising out of and/or in any wise connected with the use or occupation of said premises, and its appurtenances, or arising by reason of any breach or non-performance of any covenant or condition hereof.

(g) Upon any breach or violation by the tenant of any of the terms, covenants or conditions of this lease, for a period of twenty days after written notice, the landlord may at its election, terminate this lease, and upon such election, this lease, and all the estate of the tenant in said premises, shall come to an end, and the landlord may thereupon re-enter the said premises as of its former estate; provided, however, that the landlord may institute dispossess proceedings for the non-payment of any rent due hereunder, without the necessity of such notice; and provided further that if the breach or violation by the tenant

relates to any covenant other than the payment of rent, then the landlord shall not be entitled to elect to terminate this lease unless the tenant fails, within said period, to begin to remedy the breach or violation complained of, and thereafter fails to diligently complete the remedying thereof; and provided further, that if the breach or violation complained of shall be the result of any action taken under any statute, ordinance, rule or requirement of any governmental body, then, if the tenant shall institute and prosecute diligently any bona fide action to establish the invalidity thereof, the period of twenty days shall be suspended until the final termination of such proceedings. [fol. 39] Any waiver by the landlord of any breach shall not be deemed a waiver of any similar or other further breach. The rights and privileges herein reserved shall be in addition to the remedy afforded to the landlord in the courts of law and equity.

(h) If at any time, during the term hereof, proceedings in bankruptcy or in equity shall be instituted by or against the tenant, and/or by or against any assignee or sub-lessee to whose assignment or sub-lease the landlord has consented, resulting in its adjudication as a bankrupt, or as an insolvent corporation; and/or if the tenant or said assignee or sub-tenant shall compound its debts or assign its estate or effects for payment thereof; and/or if any execution shall issue against the tenant or said assignee or subtenant or its property on the premises, and a sale be had thereunder; and/or if a receiver or trustee shall be appointed of the tenant or its assignee or sublessee, or of its or their property, and said appointment is not vacated within twenty days after such appointment; and/or if this lease shall by operation of law devolve upon or pass to any person or persons other than the tenant or said assignee or sub-tenant personally, then and in any of said contingencies, this lease shall, at the option of the landlord, cease and come to an end, ten days after written notice to that effect shall be served by the landlord upon the tenant or its assignee, or sub-lessee, or receiver or trustee, at the demised premises. Thereupon, at the end of said ten day period, the landlord shall immediately become entitled to repossess said premises, and re-enter the same as of its former estate.

[fol. 40] (i) If the premises shall become abandoned during said term, and/or if the tenant shall be dispossessed or removed from said premises, and/or if the term hereof shall end prior to the expiration date fixed herein because of any act or omission of the tenant, and/or because of the happening of any contingency or event herein provided for, and/or because of the election of the landlord pursuant to the terms hereof, the tenant does hereby authorize the landlord, at its option, to re-enter the same as agent of the tenant, or for its own account, or otherwise, to re-let the same, and to repair or remodel the same if necessary or desirable for re-letting purposes, and to receive and apply the rents so received to the payment of the rents due hereunder, together with the cost of such repairing, remodeling and/or re-letting. The tenant shall not be entitled to any surplus accruing as a result of any re-letting, but shall remain liable for any deficiency, which deficiency shall, at the option of the landlord, become payable on demand, or become payable as it accrues from month to month. The tenant further agrees, that notwithstanding any entry or re-entry by the landlord, whether by summary proceedings, termination or otherwise, it will pay and be liable for, on the days originally fixed herein for the payment thereof, amounts equal to the several installments of rent and other charges reserved herein, in the same manner as if this lease had not been terminated, and/or in the same manner, as if the landlord had not entered or re-entered as aforesaid. No entry or re-entry by the landlord, whether had or taken under what are known generally as summary proceedings, or otherwise, shall be deemed to absolve or [fol. 41] discharge the tenant from liability hereunder.

(j) In the event that the demised premises, or any part thereof, shall be taken for public or quasi-public use, by any power or authority, having the right to take the same by condemnation, eminent domain, or otherwise, the amount awarded for compensation for the whole or part of the demised premises so taken, shall be paid to the landlord, and the tenant hereby expressly grants unto the landlord the entire amount of said award or compensation, hereby expressly disclaiming all right, title and interest therein, and agrees that it shall have no claim for any damages or loss against the landlord by reason of such condemnation

or taking. This lease shall come to an end as of the date title shall vest in the taking body, and the landlord and tenant shall thereupon be released of and from all obligations and liability to each other accruing hereunder thereafter. The tenant shall pay all rent accrued up to the time of the passing of title, and if any rent has been paid in advance, or any security been furnished, the landlord shall return any balance not owing.

(k) Until otherwise agreed, any notice provided for by this lease may be served either personally, or by mailing the same by registered mail addressed to the landlord at 211 Springfield Avenue, Newark, New Jersey, and to the tenant at 203 Springfield Avenue, Newark, New Jersey.

(l) The landlord shall not be liable to the tenant for any damages sustained by it due to defects or change in condi-
[fol. 42] tion in the premises, or in any part of the premises of which the demised premises are a part, nor to any person, nor to any goods or things of any person, by reason of any cause whatsoever, relating or occurring in the demised premises, or in any other portion of the building of which the demised premises are a part.

(m) This lease shall be subject and subordinate at all times to the lien of any mortgages now encumbering, or which may hereafter be placed upon the lands and premises, of which the demised premises are a part, provided the total amount of mortgage encumbrances shall not exceed Three Hundred Thousand ($300,000.00) Dollars. The tenant covenants and agrees to duly execute, acknowledge and deliver upon demand, such further instrument or instruments as shall be required by the landlord and/or any mortgagee for the purpose of carrying this clause into effect, and the tenant hereby appoints the landlord its attorney-in-fact, irrevocably, to execute and deliver any such instruments, in the event of its failure or refusal so to do.

(n) The landlord covenants that upon the tenant paying the rentals and performing the covenants aforesaid, the tenant shall and may peaceably and quietly have, hold and enjoy the said premises for the term aforesaid.

(o) Nothing herein contained shall be construed as a consent on the part of the landlord to subject the estate of the landlord to liability under the Mechanic's Lien Law of the

State of New Jersey, it being expressly understood that [fol. 43] the landlord's estate shall not be subject to such liability.

(p) In case the demised premises, or any part thereof, shall be damaged by fire, without any fault on the part of the tenant, then

1. In case such damage should be so slight as not to interfere substantially with the use by the tenant of the demised premises, the landlord shall repair the damage as speedly as possible, and there shall be no abatement of rent; but if

2. Such damage should render the demised premises untenantable in whole or in part, without causing a total destruction thereof, the landlord shall repair the same as speedily as possible, and there shall be an abatement from the date of the fire until such repairs have been substantially completed, of so much of the rent as the rental value of the untenantable portion of the premises shall fairly bear to the rent of the entire demised premises.

3. In case of a total destruction of the premises, or of the building, of which the premises are a part, then this lease shall terminate ten days after either party shall serve written notice to that effect upon the other, at which time the tenant's right to possession shall cease and come to an end. The tenant shall pay all rent to the date of the fire, and if any rent has been paid in advance, or any security furnished, the landlord shall return any balance not owing.

[fol. 44] (q) If the tenant should omit to make any payment, which the tenant is obliged to make hereunder, the landlord may make or pay the same, and the amount or cost thereof, together with interest, shall be added to, and be deemed part of the next installment of rent falling due thereafter.

5. The terms, covenants and conditions of the within lease shall be binding upon and enure to the benefit of each of the parties hereto, their respective executors, administrators, successors and assigns, as the case may be.

6. The neuter gender, when used herein and in the acknowledgment hereafter set forth, shall include all persons and corporations, and words used in the singular shall in-

clude words in the plural where the text of the instrument so requires.

In witness whereof the parties have hereunto set their hands and seals, and the corporate parties hereto have caused these presents to be executed by their duly authorized officers, and their corporate seal to be hereto affixed.

Morris Miller (L. S.) Israel Wachsman (L. S.)

Signed, sealed and delivered in the presence of Harry Wische.

[fol. 45] EXHIBIT TO AFFIDAVIT

Lease

This Indenture of Lease, made this 1st day of July, 1933, between Moris Miller, hereinafter referred to as the "landlord," and Moris Miller & Sons, a corporation, hereinafter referred to as the "tenant,"

Witnesseth: In consideration of the promises, covenants and agreements herein entered into between the parties, the parties do agree to and with each other, for themselves, and their respective executors, administrators, successors and assigns, as follows:

1. The landlord does hereby demise and lease unto the tenant premises No. 203 Springfield Avenue, Newark, New Jersey, together with storage space in the cellar directly under the aforesaid premises, together with the use, during the term hereof and any renewal hereof of the chattels and fixtures now contained in the said store, hereinafter referred to as the "premises", for the term beginning July 1, 1933 and ending June 30, 1938, at the annual rental of Twelve Hundred Dollars ($1200.00), it being expressly understood that the tenant shall not pay any rent for said premises until January 1, 1934. The parties agree that the tenant shall have the right to cancel lease, upon giving to the landlord sixty days of its intension so to do. All of said rents shall be payable in equal monthly installments in advance, on the first day of each and every month during said term, excepting that rent for the first month shall be paid upon the execution hereof.

2. In addition to the foregoing rental, and as part of the total rent to be paid by the tenant to the landlord, the tenant agrees:

[fol. 46] (b) To procure, maintain and pay the premiums on plate glass insurance covering the plate glass in said premises;

(c) To procure, maintain and pay the premiums for public liability insurance, insuring and indemnifying the landlord and tenant, as their respective interests may appear, against any loss or damage that may be incurred by any person, or the property of any person, by reason of any use of said premises, which insurance shall be carried by companies of adequate financial responsibility and shall be in such form that the company shall be obligated to pay by reason of injury and/or damages to any one person, a sum not in excess of $10,000.00, and sums aggregating not more than $20,000.00 by reason of any one happening;

(d) The aforesaid items of additional rent shall be payable on the first of the month next succeeding the incurring of the indebtedness therefor.

3. This lease is made upon the following covenants and conditions, each of which the respective parties hereto agree to observe and perform:

(a) The tenant shall pay said several rentals punctually.

(b) Unless the landlord consents thereto in writing, the tenant, under penalty of forfeiture and damages:

1. Will not use or permit said premises to be used for [fol. 47] any other purpose than for the sale of men's hats, caps, shoes and haberdashery.

2. Will not assign this lease, nor re-let or underlet said premises, or any part thereof.

3. Will not make any alterations to said premises.

(c) The tenant will, at its own cost, promptly comply with and perform all statutes, ordinances, orders, requirements and regulations, present and future, of any Federal, State, county and/or Municipal authority, or agency or subdivision thereof having jurisdiction over or affecting said premises, including the lands appurtenant thereto.

(d) The tenant, at its own cost, will keep the premises in good, safe and proper repair, and tenantable condition during the term (wear and tear arising from a reasonable use of the same, and damages by the elements excepted); and will not suffer any act of commission or omission which will increase the rate of insurance in existence at the execution hereof, and will not call upon the landlord, during the term of this lease for the making of any repairs whatsoever. At the expiration of said term, the tenant shall yield up possession thereof to the landlord, in as good condition as said premises were at the commencement of said term, reasonable wear and tear and damages by the elements excepted.

(e) The landlord may enter upon said premises at reasonable business hours on week days to examine the same, and may during the last six months of said term, exhibit the [fol. 48] same to any person or persons, and during said time may also maintain "To Let" and "For Sale" notices on the outside walls thereof.

(f) The tenant shall indemnify and save the landlord harmless from all fines, suits, proceedings, claims and/or actions of any kind arising out of and/or in any wise connected with the use or occupation of said premises, and its appurtenances, or arising by reason of any breach or nonperformance of any covenant or condition hereof.

(g) Upon any breach or violation by the tenant of any of the terms, covenants or conditions of this lease, for a period of twenty days after written notice, the landlord may at its election, terminate this lease, and upon such election, this lease, and all the estate of the tenant in said premises, shall come to an end, and the landlord may thereupon re-enter the said premises as of its former estate; provided, however, that the landlord may institute dispossess proceedings for the non-payment of any rent due hereunder, without the necessity of such notice; and provided further that if the breach or violation by the tenant relates to any covenant other than the payment of rent, then the landlord shall not be entitled to elect to terminate this lease unless the tenant fails, within said period, to begin to remedy the breach or violation complained of, and thereafter fails to diligently complete the remedy thereof; and provided further, that if the breach or violation complained

of shall be the result of any action taken under any statute, ordinance, rule or requirement of any governmental body, then, if the tenant shall institute and prosecute diligently [fol. 49] any bona fide action to establish the invalidity thereof, the period of twenty days shall be suspended until the final termination of such proceedings. Any waiver by the landlord of any breach shall not be deemed a waiver of any similar or other further breach. The rights and privileges herein reserved shall be in addition to the remedy afforded to the landlord in the courts of law and equity.

(h) If at any time, during the term hereof, proceedings in bankruptcy or in equity shall be instituted by or against the tenant, and/or by or against any assignee or sub-lease to whose assignment or sub-lease the landlord has consented, resulting in its adjudication as a bankrupt, or as an insolvent corporation; and/or if the tenant or said assignee or sub-tenant shall compound its debts or assign its estate or effects for payment thereof; and/or if any execution shall issue against the tenant or said assignee or sub-tenant or its property on the premises, and a sale be had thereunder; and/or if a receiver or trustee shall be appointed of the tenant or its assignee or sub-lessee, or of its or their property, and said appointment is not vacated within twenty days after such appointment; and/or if this lease shall by operation of law devolve upon or pass to any person or persons other than the tenant or said assignee or sub-tenant personally, then and in any of said contingencies, this lease shall, at the option of the landlord, cease and come to an end, ten days after written notice to that effect shall be served by the landlord upon the tenant or its assignee, or sub-lessee, or receiver or trustee, at the demised premises. Thereupon, at the end of said ten day [fol. 50] period, the landlord shall immediately become entitled to repossess said premises, and re-enter the same as of its former estate.

(i) If the premises shall become abandoned during said term, and/or if the tenant shall be dispossessed or removed from said premises, and/or if the term hereof shall end prior to the expiration date fixed herein because of any act or omission of the tenant, and/or because of the happening of any contingency or event herein provided for, and/or because of the election of the landlord pursuant to the terms hereof, the tenant does hereby authorize the landlord, at

its option, to re-enter the same as agent of the tenant, or for its own account, or otherwise, to re-let the same, and to repair or remodel the same if necessary or desirable for re-letting purposes, and to receive and apply the rents so received to the payment of the rents due hereunder, together with the costs of such repairing, remodeling and/or re-letting. The tenant shall not be entitled to any surplus accruing as a result of any re-letting, but shall remain liable for any deficiency, which deficiency shall, at the option of the landlord, become payable on demand, or become payable as it accrues from month to month. The tenant further agrees, that notwithstanding any entry or re-entry by the landlord, whether by summary proceedings, termination or otherwise, it will pay and be liable for, on the days originally fixed herein for the payment thereof, amounts equal to the several installments of rent and other charges reserved herein, in the same manner as if this lease had not [fol. 51] been terminated, and/or in the same manner, as if the landlord had not entered or re-entered as aforesaid. No entry or re-entry by the landlord, whether had or taken under what are known generally as summary proceedings, or otherwise, shall be deemed to, absolve or discharge the tenant from liability hereunder.

(j) In the event that the demised premises, or any part thereof, shall be taken for public or quasi-public use, by any power or authority, having the right to take the same by condemnation, eminent domain, or otherwise, the amount awarded for compensation for the whole or part of the demised premises so taken, shall be paid to the landlord, and the tenant hereby expressly grants unto the landlord the entire amount of said award or compensation, hereby expressly disclaiming all right, title and interest therein, and agrees that it shall have no claim for any damages or loss against the landlord by reason of such condemnation or taking. This lease shall come to an end as of the date title shall vest in the taking body, and the landlord and tenant shall thereupon be released of and from all obligations and liability to each other accruing hereunder thereafter. The tenant shall pay all rent accrued up to the time of the passing of title, and if any rent has been paid in advance, or any security been furnished, the landlord shall return any balance not owing.

(k) Until otherwise agreed, any notice provided for by this lease may be served either personally, or by mailing the same by registered mail addressed to the landlord at 211 [fol. 52] Springfield Avenue, Newark, New Jersey, and to the tenant at 203 Springfield Avenue, Newark, New Jersey.

(l) The landlord shall not be liable to the tenant for any damages sustained by it due to defects or change in condition in the premises, or in any part of the premises of which the demised premises are a part, nor to any person, nor to any goods or things of any person, by reason of any cause whatsoever, relating or occurring in the demised premises, or in any other portion of the building of which the demised premises are a part.

(m) This lease shall be subject and subordinate at all times to the lien of any mortgages now encumbering, or which may hereafter be placed upon the lands and premises, of which the demised premises are a part, provided the total amount of mortgage encumbrances shall not exceed Three Hundred Thousand ($300,000.00) Dollars. The tenant covenants and agrees to duly execute, acknowledge and deliver upon demand, such further instrument or instruments as shall be required by the landlord and/or any mortgagee for the purpose of carrying this clause into effect, and the tenant hereby appoints the landlord its attorney-in-fact, irrevocably, to execute and deliver any such instruments, in the event of its failure or refusal so to do.

(n) The landlord covenants that upon the tenant paying the rentals and performing the covenants aforesaid, the tenant shall and may peaceably and quietly have, hold and enjoy the said premises for the term aforesaid.

[fol. 53] (o) Nothing herein contained shall be construed as a consent on the part of the landlord to subject the estate of the landlord to liability under the Mechanic's Lien Law of the State of New Jersey, it being expressly understood that the landlord's estate shall not be subject to such liability.

(p) In case the demised premises, or any part thereof, shall be damaged by fire, without any fault on the part of the tenant, then

1. In case such damage should be so slight as not to interfere substantially with the use by the tenant of the demised premises, the landlord shall repair the damage as

speedily as possible, and there shall be no abatement of rent; but if

2. Such damage should render the demised premises untenable in whole or in part, without causing a total destruction thereof, the landlord shall repair the same as speedily as possible, and there shall be an abatement from the date of the fire until such repairs have been substantially completed, of so much of the rent as the rental value of the untenantable portion of the premises shall fairly bear to the rent of the entire demised premises.

3. In case of a total destruction of the premises, or of the building, of which the premises are a part, then this lease shall terminate ten days after either party shall serve written notice to that effect upon the other, at which time the tenant's right to possession shall cease and come to an end. The tenant shall pay all rent to the date of the fire, and if any rent has been paid in advance, or any security [fol. 54] furnished, the landlord shall return any balance not owing.

(q) If the tenant should omit to make any payment, which the tenant is obliged to make hereunder, the landlord may make or pay the same, and the amount or cost thereof, together with interest, shall be added to, and be deemed part of the next installment of rent falling due thereafter.

4. The terms, covenants and conditions of the within lease shall be binding upon, and enure to the benefit of each of the parties hereto, their respective executors, administrators, successors and assigns, as the case may be.

5. The neuter gender, when used herein and in the acknowledgment hereafter set forth, shall include all persons and corporations, and words used in the singular shall include words in the plural where the text of the instrument so requires.

In witness whereof the parties have hereunto set their hands and seals, and the corporate parties hereto have caused these presents to be executed by their duly authorized officers, and their corporate seal to be hereto affixed.

Moris Miller (L. S.) Moris Miller & Sons, Inc.,
by Martin B. Miller, Vice President.

Signed, sealed and delivered in the presence of Harry Miller, Secretary.

[fol. 55] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ORDER OF REFEREE—May 15, 1934

Duplicate proofs of claim having been filed herein by Morris Miller, each in the sum of $16,625.00, and objections thereto having been filed by Irving Trust Company Trustee in Bankruptcy, upon the ground that the amount of the indebtedness owing to the said claimant by the bankrupt is but the sum of $400.00, and the said Trustee having prayed that the said duplicate claims be consolidated, and as so consolidated reduced to the sum of $400.00.

Now, upon reading and filing the said objections to the claim of Morris Miller, and the notice bringing on the same for hearing before the undersigned, and due proof of service thereof, and the matter having duly come on for hearing, and it appearing that the amount of the indebtedness of the bankrupt to the claimant at the time of the filing of the petition in bankruptcy herein was the sum of $1,000.00, and it further appearing that the claimant has already received the sum of $600.00 upon account of said indebtedness, pur-
[fol. 56] suant to the Landlord and Tenant Act of the State of New Jersey, and that the balance due and owing the claimant is the sum of $400.00, and after hearing McManus, Ernst & Ernst, Lester D. Melzer, of counsel, attorneys for the Trustee in Bankruptcy, in support of the objections filed to the said claim, and Stroock & Stroock, Robert D. Steefel, of counsel, attorneys for Morris Miller, in opposition thereto, it is, on motion of McManus, Ernst & Ernst, attorneys for the Trustee in Bankruptcy,

Ordered that the duplicate claims filed herein by Morris Miller, be and they hereby are consolidated and the consolidated claim of Morris Miller be and it hereby is reduced from the sum of $16,625.00 to the sum of $400.00, and allowed as a general claim herein in the said sum of $400.00.

Dated, New York, May 15, 1934.

Oscar W. Ehrhorn, Referee in Bankruptcy.

[fol. 57] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

DECISION OF REFEREE—May 9, 1934

Memorandum of Referee on Objections to Claim of Morris Miller

In this case the obligation was not certain in amount and event when the petition in bankruptcy was filed.

The claim should therefore be reduced to $400, being the sum of $1,000 due at the time of bankruptcy, less $600 priority payment under the New Jersey statute, heretofore paid.

Settle order on notice.

Dated, May 9th, 1934.

Oscar W. Ehrhorn, Referee in Bankruptcy.

[fol. 58] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

PETITION TO REVIEW

The petition of Morris Miller respectfully shows:

I. That said Morris Miller is a creditor of the above named bankrupt, having heretofore filed his proof of claim in the sum of $16,625, as more particularly appears from said proof of claim which is made a part hereof.

II. That by notice dated September 27th, 1933, Irving Trust Company as Trustee in Bankruptcy of the bankrupt herein requested the Referee to enter an order herein reducing the claim of the said Morris Miller to the sum of $400.

III. That a hearing was had before said Referee and thereafter, on May 15th, 1934, the Referee herein made an order, a copy of which is hereto annexed and made a part hereof. Said order was and is erroneous in that:

(a) The Referee erred in reducing the claim of Morris Miller from $16,625 to the sum of $400;

(b) The Referee erred in that he did not allow the claim of Morris Miller in the sum of $16,625;

(c) The Referee erred in holding that the claimant Morris Miller was not entitled to prove herein for a sum equal [fol. 59] to the present discounted value of the difference between the rent reserved under the lease referred to in claimant's proof of claim for the balance of the term thereof and the fair rental value of the premises at the date of the bankruptcy of the bankrupt herein;

(d) The Referee erred in holding that the claim of the claimant was not certain in amount and event when the petition in bankruptcy was filed;

(e) The Referee erred in his conclusions of law on the evidence offered at said hearing.

Wherefore, your petitioner feeling aggrieved because of such order, claims that the same may be reviewed as provided in the General Orders in Bankruptcy, Rule XXVII.

Dated Newark, N. J., May 22, 1934.

Morris Miller, Petitioner-Claimant.

Duly sworn to by Morris Miller. Jurat omitted in printing.

[fol. 60] In United States District Court, Southern District of New York

[Title omitted]

Referee's Certificate on Petition for Review of Order Reducing Claim of Morris Miller—Filed May 15, 1934

To the Honorable Judges of the District Court of the United States for the Southern District of New York:

I, Oscar W. Ehrhorn, Referee in Bankruptcy in charge of the above entitled proceeding, do hereby certify:

That in the course of such proceeding, Irving Trust Company, the Trustee in Bankruptcy herein, filed objections to the claim of Morris Miller, which was filed herein in the

sum of $16,625, of which $600 claimed as priority, as a result of which, after proceedings duly had, an order was made and entered herein on May 15, 1934 allowing the claim at $1,000, of which $600 priority had heretofore been paid, leaving a balance due of $400.

[fol. 61] That thereafter, the claimant herein, feeling aggrieved thereat, filed with me his petition for review, which was granted.

That the errors complained of are set forth in such petition for review.

Pursuant to the provisions of General Order XXVII, I hereby certify that the question presented is whether the Referee was right in allowing to the landlord-claimant only the amount that was due for past rent unpaid at the time of the filing of the petition in bankruptcy, or whether he should have allowed to the landlord-claimant also the amount of $16,025 for damages for breach of the lease.

It was not disputed that at the time of the filing of the petition in bankruptcy there was due to the claimant for past due rent the sum of $1,000, but $600 of this sum was allowed as a priority claim, pursuant to the provisions of the Landlord and Tenant Act of the State of New Jersey, which $600 was heretofore paid to the claimant by the Trustee in Bankruptcy, leaving due the sum of $400.

The claimant contends that several months prior to the bankruptcy the tenant had breached the lease and vacated the premises; that the landlord was therefore entitled to prove the difference between the avails of reletting and the amount of rent that was provided for in the lease.

It is to be noted that the lease provided that in the event of a breach the tenant would pay to the landlord, monthly, the difference between the amount obtained on reletting and the reserved rent provided for in the lease.

As set forth in the Memorandum of the Referee dated May 9, 1934, at the time that the petition in bankruptcy was [fol. 62] filed the obligation was not certain in amount and event.

See In re Outfitters Operating Realty Co., Inc., Bankrupt —A. W. Perry, Inc., Appellant, v. Irving Trust Company, Appellee (C. C. A. 2d Circuit, per Learned Hand, Judge; In re Roth & Appel, 181 Fed. 667.

I hand up herewith for the information of the Judges, the following papers:

(1) Proof of claim Morris Miller for $16,625, filed September 23, 1932; and Amended Claim for same amount, of which $600 claimed as priority, filed February 23, 1933;

(2) Objection to same by Trustee, filed May 2, 1933;

(3) Notice of hearing on same, filed October 17, 1933; and subsequent notice of hearing, filed March 20, 1934;

(4) Memorandum of Referee reducing claim to $1,000, of which $600 heretofore paid, leaving $400 due, filed May 9, 1934;

(5) Order allowing claim allowing claim at $400, filed May 15, 1934;

(5) Petition for review, filed May 24, 1934;

(6) Stipulation of facts, Claimant's Exhibit A, April 5, 1934;

[fol. 63] (7) Testimony re claim Morris Miller (pages 4-5).

Pursuant to the practice duly adopted, I direct that the hearing on this certificate *he* had before the Honorable District Judge, holding the Bankruptcy Part, on Thursday, May 31, 1934, at 10:30 A. M.

I certify that copies of this certificate have been mailed to the following:

Messrs. Stroock & Stroock, attorneys for claimant, 141 Broadway, N. Y.

Messrs. McManus, Ernst & Ernst, attorneys for Trustee, 170 Broadway, N. Y.

Dated, New York, May 24th, 1934.

Oscar W. Ehrhorn, Referee in Bankruptcy.

[fol. 64] In United States District Court, Southern District of New York

In Bankruptcy

No. 55118

In the Matter of Sarnoff-Irving Hat Stores, Inc., Bankrupt

Re Claim of Morris Miller

Order Appealed From—Feb. 11, 1935

A motion having been duly made by Irving Trust Company, as Trustee in Bankruptcy of Sarnoff-Irving Hat Stores, Inc., for an order dismissing the petition of Morris Miller, duly verified, and filed in the office of Hon. Oscar W. Ehrhorn, Referee in Bankruptcy, on the 24th day of May, 1934, for a review of the order of the said Referee, dated May 15th, 1934, reducing the claim filed herein by Morris Miller, to the sum of $400.00, and allowing the same as a general proof of claim herein in the said sum of $400.00, and after hearing McManus, Ernst & Ernst, Lester D. Melzer, of counsel, attorneys for Irving Trust Company, [fol. 65] as Trustee in Bankruptcy of Sarnoff-Irving Hat Stores, Inc., in support of the said motion, and Stroock & Stroock, Robert D. Steefel, of counsel, attorneys for Morris Miller, claimant, in opposition thereto, and upon the opinion heretofore filed herein, it is, on motion of McManus, Ernst & Ernst, attorneys for Irving Trust Company, as Trustee in Bankruptcy of Sarnoff-Irving Hat Stores, Inc.,

Ordered that said order entered herein by Hon. Oscar W. Ehrhorn, Referee in Bankruptcy, dated May 15th, 1934, be and it hereby is in all respects approved and confirmed; and it it further

Ordered that the petition filed herein on May 24th, 1934, for a review of said order, be and it hereby is denied.

Herbert, U. S. D. J.

[fol. 66] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

No. 55118

In the Matter of SARNOFF-IRVING HAT STORES, INC., Bankrupt

OPINION OF HULBERT, J.—February 4, 1935

HULBERT, J.:

Morris Miller, landlord, petitions to review a Referee's report reducing claim filed by him against the bankrupt from $16,625.00 to $400.00.

It was stipulated that the claimant and the bankrupt entered into a lease for ten years on January 17th, 1928, which was modified in writing on December 29th, 1931. An equity action was begun in this District on April 27th, 1932 against the now-bankrupt Company and two Receivers were appointed. One of these Receivers subsequently resigned and the Irving Trust Company continued to act as the sole Receiver until it was elected and qualified as Trustee, and remained in possession of the premises until July 18th, 1932. On June 1st, 1932, said sole Receiver disaffirmed the lease and on July 18th, 1932, vacated the premises pursuant thereto. The claimant re-entered and took possession on July 25th, 1932. On August 27th, 1932, the Sarnoff-Irving Hat Stores, Inc., filed a voluntary petition in bankruptcy.

[fol. 67] The Proof of Claim filed by petitioner consisted of two items:

(a)	Rent for March and April, 1932, at $300.00 per month	$ 600.00
	and	
(b)	The difference between the rent reserved in the lease from May 1st, 1932 to July 31st, 1928 amounting to $32,000.00 and the fair annual rental of the said premises, to wit, the sum of $2,400.00 per year for a period of three years, and the further sum of $2,700.00 per year for a period of three years, three months, being the balance of said terms as called for in said lease	$16,025.00
	Total	$16,625.00

The first item (a) was filed as a priority claim, and the second (b) as a general claim.

The Trustee objected to the claim and sought to have it reduced to $1,000.00. After a hearing, the Referee reduced it to $400.00 ($600.00 having already been allowed and paid as a priority claim).

The claimant now seeks to review the Referee's findings.

The lease provided that in the event of a breach the [fol. 68] tenant would pay to the landlord, monthly, the difference between the amount obtained on reletting and the reserved rent provided for in the lease.

The questions involved in the instant case are (1) whether the claim is one founded upon a contract, express or implied, and provable under 63(a) of the National Bankruptcy Act and (2) whether the damages may be liquidated under 63(b) of the Act.

The breach having occurred before the petition in bankruptcy was filed, there seems to be no question that the claim is provable under 63(a) but there is a vigorous dispute that the claim can be liquidated under 63(b) and that was the ground upon which the Referee disallowed all but that amount accruing before bankruptcy.

The claimant contends that this case is not distinguishable from Central Trust Company v. Chicago Auditorium Association, 240 U. S. 581, in which there was an anticipatory breach of an executory contract covering a license privilege for the maintenance and operation of a baggage and delivery concession, with a provision for damages similar to the one in this case. The Supreme Court held that intervening bankruptcy constituted a breach and held the claim for damages was one founded upon a contract express or implied and provable under 63(a), and that the damages could be liquidated under 63(b).

The claimant argues that since the breach of the lease in the instant case occurred some time before bankruptcy, and since the landlord had already re-entered before the filing of the petition, his damages now are those for the [fol. 69] breach of a personal covenant to pay damages and not for the breach of the lease and hence falls within the Chicago Auditorium case (supra).

However, it seems to me that:

First, the damages for the breach of the personal covenant are identical with those which could be claimed for

breach of the lease and are determinable in the same way. Clearly, the instant case comes within the class of those dealing with a breach of the landlord-tenant relationship.

Secondly, in the Chicago Auditorium case (supra), the Court said, at p. 590,

"besides which a number of cases arising out of the relation of landlord and tenant are cited: In re Ells, 98 Fed. Rep. 967; In re Pennewell, 119 Fed. Rep. 139; Watson v. Merrill, 136 Fed. Rep. 359; In re Roth & Appel, 181 Fed. Rep. 667; Colman Co. v. Withoft, 195 Fed. Rep. 250. Cases of the latter class are distinguishable, because of the 'diversity between duties which touch the realty, and the mere personalty.' Co. Litt., 292, b, #513."

That would seem to indicate that the Court did not consider landlord and tenant type cases in its opinion and so the decision should not be binding as to them.

In Re Roth & Appel, 181 Fed. 667, decided in 1910 by the Circuit Court of Appeals, Second Circuit, there was a lease with a provision similar to the one here in question. The lessees became bankrupt and the landlord sought to prove a claim for damages for breach of the lease. The [fol. 70] Court said that claims for future rent were, of course, never provable and that this claim for damages was likewise not provable. It was said at p. 672:

"Indeed, looking at the claim as it existed either at the time of the petition or the adjudication, it was altogether contingent in its nature:

(1) It was uncertain, as just pointed out, whether the lessor would re-enter and terminate the lease.

(2) In case the lease was terminated, it was uncertain whether there would be any loss in rents. If the rent received by the landlord from the new tenant equaled or exceeded that stipulated in the lease, there would be no loss, and, consequently, no foundation for any claim upon the indemnity covenant."

It is significant that in the Roth case the landlord had already re-let the premises at a substantially lower rental prior to the filing of the claim which was after the petition was filed but before adjudication, and still the Court found

that the damages were too speculative, under (2) above, to be determined.

Later, in the case of Manhattan Properties, Inc. v. Irving Trust Co., 66 Fed. (2) 470, decided in 1933 by the Circuit Court of Appeals, Second Circuit, affirmed in 291 U. S. 320, the Court in discussing the Roth & Appel case said that its former determination as to the contingency of the claim [fol. 71] had been expressly overruled by Maynard v. Elliott, 283 U. S. 273, and "our decision must rest upon the ground that, though the contingency of the claim is no objection to its proof, it is practically too uncertain to be liquidated." The provision of the lease in the Manhattan Properties case was like the one here involved but there was no breach until bankruptcy. A proof of claim for damages was filed and expunged on the authority of In re Roth & Appel (supra) and the decision was affirmed by the Supreme Court (supra).

In the case of In re Outfitters' Operating Realty Co., Inc.—A. W. Perry, Inc. v. Irving Trust Co., 69 Fed. (2) 90, decided in 1934 by the Circuit Court of Appeals, Second Circuit, and recently affirmed by the Supreme Court (not yet officially reported), a claim for damages for breach of lease was allowed—but there the provision was wholly different from the one here. The Circuit Court, in speaking of different covenants in leases, said:

"A common form, which was that in Re Roth & Appel (C. C. A. 2) 181 F. 667, 31 L. R. A. (N. S.) 270, is to pay on each rent day the difference between the rent reserved and rent received upon any re-letting; another is to indemnify the lessor for any loss suffered during the term. The second requires the lessor to wait till the end of the term (Hermitage Co. v. Levine, 248 N. Y. 333, 162 N. E. 97, 59 A. L. R. 1015); not so the first, under which a separate cause of action arises at the end of each period. *But in both kinds it is uncertain at petition filed whether there will be any loss, and that uncertainty is enough to invalidate the claim.*" (Italics mine.)

[fol. 72] While it is true that in the case of In re Mullings Clothing Co., 238 Fed. 58, decided in 1916 by the Circuit Court of Appeals, Second Circuit, a claim for damages for breach of a lease was allowed where a breach, occasioned by dissolution of the lessee corporation, occurred

before bankruptcy and the landlord had re-let at a lower figure before the petition in bankruptcy was filed, that decision has been strictly limited to its facts (cf. In re Metropolitan Chain Stores Inc., 66 Fed. [2] 482 at 484) and disapproved of by dicta in the Manhattan Properties case (supra), both cases decided in the Second Circuit in 1933.

It is also true that there are several statements in the Manhattan Properties case (supra) which tend to support the claimant's position. The Court, speaking through L. Hand, Circuit Judge, said:

"Moreover, the whole subject has taken on a new aspect from Central Trust Co. v. Chicago Auditorium, 240 U. S. 581, 36 S. Ct. 412, 60 L. Ed. 811, L. R. A. 1917B, 580, where bankruptcy was held to be the anticipatory breach of a contract to pay annually for a cab privilege which the grantor might revoke. The uncertainties attendant upon any future installments were as great as in the case of a covenant to pay rent under a lease."

Later on in the same case, in speaking of the doctrine of In re Roth & Appel and cases of similar import, the Court said,

"Finally, although the Bankruptcy Act has been since twice amended, Congress has made no change in this [fol. 73] feature. Indeed, as we shall show, it changed the law in this precise respect in one situation, but did not do so in this. For these reasons my brothers believe that it has become the settled law of this circuit and that we should adhere to it. For myself, while I recognize the force of the application of stare decisis, it seems to me that the basis of the doctrine disappears once contingent claims are held to be provable. That has now been authoritatively declared, and I think we should make the necessary adjustments. Certainly I have no more compunction in assessing the future value of realty than that of chattels. The periods involved are indeed apt to be longer, but the fluctuations are less rapid. Some changes must be taken, but that is often so."

Noting that this language appears in a case in which the provision in the lease was the same as that in the instant case, it might seem that if such a claim were provable under 63(a), the Court would find no difficulty liquidating

it under 63(b), and this point the claimant strongly urges. It should be remembered, however, that in the case quoted, the Court found that the claim was *not* provable under 63(*a*), so that all discussion of liquidating under 63(b) was merely dicta.

In the same case, the Court also said:

"The law, as we now understand it, is therefore that a contingent claim may in general be proved, provided its liquidation does not involve too speculative considerations, confessedly a variable standard. Among these will be the ability of the claimant himself to control the contingency."

[fol. 74] The claimant argues that his damage should be the difference between the rent reserved in the lease and the fair and reasonable rental for the remainder of the lease term. If that were the covenant, concededly the law now is that such a claim could be proved and liquidated (Perry case, supra). However, the provision in this lease is *not* as the claimant above argues. It is that the landlord may recover the difference between the rent reserved in the lease and *the amount obtained on re-letting, payable monthly.* While the ability of the claimant himself to control the *contingency* is not here involved, the ability of the claimant himself to control the *amount of the damages* is involved.

To allow such a claim as this would be to substitute the mere whim of the landlord for the safe standard of fair and reasonable rental and to make it possible for the landlord alone to fix the amount of his damages—even up to the total rent reserved in the lease. In my judgment this objection to such claims cannot be overcome and they are too speculative to be liquidated under 63(b).

In all events, I feel bound by the decisions in this District from In re Roth & Appel (supra) to and including the Perry case (supra). If the settled law of twenty-five years is to be overthrown, it should be by a court of appellate jurisdiction.

Accordingly, the Referee's report will be confirmed.

Dated, New York, N. Y., February 4th, 1935.

Hulbert, U. S. D. J.

[fol. 75] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

NOTICE OF APPEAL

SIRS:

Please take notice that the undersigned hereby appeals to the United States Circuit Court of Appeals for the Second Circuit from the order entered in the office of the Clerk of the United States District Court for the Southern District of New York on the 11th day of February, 1935, confirming the order of Hon. Oscar W. Ehrhorn, Referee in Bankruptcy, and from each and every part of said order.

Dated, New York, February 19th, 1935.

Yours, etc., Morris Miller, by Stroock & Stroock, Attorneys, Office and P. O. Address, No. 141 Broadway, Borough of Manhattan, City of New York.

To McManus, Ernst & Ernst, Esqs., Attorneys for Trustee in Bankruptcy, Office and P. O. Address, No. 170 Broadway, Borough of Manhattan, City of New York.

[fol. 76] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

PETITION FOR APPEAL

Morris Miller, feeling himself aggrieved by the order entered in the above entitled proceeding in the office of the Clerk of this Court on the 11th day of February, 1935, confirming the order of Hon. Oscar W. Ehrhorn, Referee in Bankruptcy, reducing the claim of Morris Miller from $16,250 to $400, which claim was predicated upon an alleged breach of contract by the bankrupt, does hereby appeal from said order and from each and every part thereof, to the United States Circuit Court of Appeals for the Second Circuit, for the reasons specified in the Assignment of Errors which is filed herewith, and prays for an order allowing the said petitioner to prosecute said appeal, and

that a transcript of the record and proceedings on which said order is made may be duly authenticated and sent to the United States Circuit Court of Appeals for the Second Circuit, and that a citation be issued directed to the Irving Trust Company as Trustee in Bankruptcy of the estate of the above named bankrupt, commanding it to appear before [fol. 77] the United States Circuit Court of Appeals for the Second Circuit, to do and receive what may appertain in justice to be done in the premises.

Dated, New York, February 19th, 1935.

Morris Miller, Petitioner, by Stroock & Stroock, Attorneys, Office and P. O. Address, No. 141 Broadway, Borough of Manhattan, City of New York.

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL

The foregoing appeal from the order entered herein on the 11th day of February, 1935, be and the same hereby is allowed.

Dated, New York, March 2nd, 1935.

Hulbert, United States District Judge.

[fol. 78] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ASSIGNMENT OF ERRORS

Now comes Morris Miller, claimant against the above estate in which an order was made on the 11th day of February, 1935, confirming the order made and entered herein on the 15th day of May, 1934, by Hon. Oscar W. Ehrhorn, Referee in Bankruptcy in charge of this proceeding, reducing claimant's claim from $16,250 to $400, which order he claims is erroneous and for which he files the following Assignment of Errors:

First. That said order of February 11th, 1935, is erroneous in all respects in that the same is contrary to law.

Second. That the District Court erred in affirming the ruling of the Referee, in which the Referee reduced claimant's claim from $16,250 to $400.

Third. That the District Court erred in reducing claimant's claim from $16,250 to $400 and in disallowing that part of claimant's claim which sought damages for breach [fol. 79] of an agreement in the lease upon which said claim is predicated, to pay certain damages after termination of the lease.

Fourth. That the District Court erred in finding that claimant's damages were so speculative and uncertain that the same could not be liquidated under Section 63 (b) of the Bankruptcy Act.

Fifth. That the District Court erred in determining that the damages which claimant seeks are for breach of a real covenant instead of a personal covenant.

Sixth. That the District Court erred in its conclusions of law on the evidence offered at the hearing before the Referee herein.

Wherefore, Morris Miller, petitioner, prays that the said order be reversed and that the District Court of the United States for the Southern District of New York be directed to enter an order reversing its order and reversing the decision of the Referee.

Dated, New York, February 19th, 1935.

Morris Miller, Claimant, by Stroock & Stroock, Attorneys, Office and P. O. Address, No. 141 Broadway, Borough of Manhattan, City of New York.

[fol. 80] Citation in usual form omitted in printing.

[fol. 81] In United States District Court, Southern District of New York

[Title omitted]

Stipulation as to Record

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above entitled action, as agreed upon by the parties.

Dated, New York, March 27, 1935.

Stroock & Stroock, Attorneys for Appellant. McManus, Ernst & Ernst, Attorneys for Appellee.

[fol. 82] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 83] In United States Circuit Court of Appeals for the Second Circuit

In re Sarnoff-Irving Hat Stores, Inc., Bankrupt

Morris Miller, Appellant,

against

Irving Trust Company, as Trustee, Appellee

Before L. Hand, Swan and Chase, Circuit Judges

On Appeal from the United States District Court for the Southern District of New York

Robert D. Steefel for the appellant.
Lester D. Melzer for the appellee.

Opinion—Filed May 6, 1935

Per Curiam:

Order affirmed on authority of In re F. & W. Grand 5-10-25¢ Stores, 74 Fed. (2) 654 (C. C. A. 2).

[File endorsement omitted.]

[fol. 84] IN UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

In the Matter of SARNOFF-IRVING HAT STORES, INC., Bankrupt

MORRIS MILLER, Appellant

DECREE—Filed May 13, 1935

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 85] [File endorsement omitted.]

[fol. 86] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 87] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 3, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, and the case is assigned for argument immediately following No. 847, Urban Properties Co. vs. Irving Trust Company, as Trustee in Bankruptcy of F. & W. Grand 5-10-25 Cent Stores.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied

the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 39,618. U. S. Circuit Court of Appeals, Second Circuit. Term No. 67. Morris Miller, Petitioner, vs. Irving Trust Company, as Trustee in Bankruptcy of Sarnoff-Irving Hat Stores, Inc., Bankrupt. Petition for a Writ of Certiorari and Exhibit thereto. Filed May 23, 1935. File No. 67, O. T., 1935.

(6556-C)